United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1178

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P/S

To be argued by
HOWARD F. CERNY

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

FRANK CLARK, III,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT

HOWARD F. CERNY
Attorney for Defendant-Appellant
345 Park Avenue
New York, New York 10022
(212) 688-0700

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FOR THE SOUTHERN DISTRICT OF NEW YORK

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STATEMENT

It is not Appellant's purpose, in submitting this reply brief, to subject this Court to a reargument of the propositions already fully stated in Appellant's initial brief. The function of this brief will be to point out in the shortest manner possible certain fallacies in the Government's arguments.

ARGUMENTS

I

THERE WAS NO DIRECT EVIDENCE THAT THE RING WAS STOLEN NOR THAT THE DEFENDANT KNEW THE RING WAS STOLEN AND THE EVIDENCE ADDUCED FROM WHICH INFERENCES WERE ALLOWED ON THESE TWO POINTS WAS SO COMPLETELY INADEQUATE THAT THE COURT BELOW ERRED AS A MATTER OF LAW IN FAILING TO DIRECT AN ACQUITTAL AND PERMITTING THE CASE TO GO TO THE JURY.

On page 2 of its brief the Government states the ring in question was shown to a potential customer at Nieman Marcus on May 25, 1972 but " after that date the diamond was never seen again by anyone at Nieman-Marcus ", citing transcript and exhibits. In fact that is not the testimony. On page 73 of the transcript, Mr. Magner testified that after he showed the ring on May 25, 1972, he doesn't recall ever seeing the diamond again. Thus not only is there no testimony that this ring was never seen again by anyone at Nieman-Marcus after May 25, 1972, but Magner, the salesman from Nieman- Marcus didn't even preclude the possibility of his having seen the ring again after that date. He merely said he didn't recall seeing it after that date. And furthermore, how could Magner or anyone else state with any accuracy whatsoever that " the diamond was never seen again by anyone at Nieman-Marcus ". This clear implication of such an erroneous statement is to attempt to exonerate the store and place the blame for the loss on some third person such as the defendant. This is not only wrong but there is no basis for it.

The Government then states on page 2 of its brief that the diamond was reported missing at inventory time at Nieman- Marcus in July 1972. There is no testimony concerning this ring from the time Magner testified he showed the to a potential customer on May 25, 1972 (72) and the time the ring was reported as missing during the inventory at Nieman-Marcus in July 1972 (83). In fact Magner couldn't even recall whether or not he took the diamond with him after he showed it to the potential customer in Mr. Ramsden's office on May 25, 1975 (72). Thus the testimony is that the last person known to have the ring in his hand at Nieman-Marcus, couldn't recall what he did with it. Its fair to deduce therefore that Magner couldn't recall whether he took it with him, whether he left it in Mr. Ramsden's office, or whether he gave it to someone else. With this type of evidence, its understandable why the store did not report the ring as missing to law enforcement authorities as soon as it discovered it was missing.

Futhermore, the store in conducting its inventory only marked the ring as missing and it didn't characterize whether it was missing by

virtue of loss or being stolen (83). Had the store known that the ring was stolen, or had there been any basis to deduce it was stolen, it would have so stated. In fact not only was the evidense consistent that the ring was misplaced or merely missing as it was stolen, but in fact the evidence in more persuasive that it was only missing as opposed to stolen because the inventory was remarked as only missing (83).Magner testified missing meant that it was not there (83); Magner doesn't recall what he did with the ring the last time he recalls having it and according to the Government he was the last person from the store known to have seen it; and the Government itself claims the store exercises extreme caution in safeguarding precious jewelry such as the ring.

On page 2 of its brief the Government characterizes the search by the store as thorough, Magner testified as to the procedures of the search. He explained the office takes the stock sheet (GX 6) and does the following:

1. Asks everybody in the office "if they know where it went".
2. Ask "if they remember sending it someplace to another store or returning it to a manufacturer".
3. If they say no, then they check all their trip books and all the things the store has out to customers on approval.
4. Check all of the transfer books.
5. "If they can't remember anything by that", they come down to the sales floor and ask if any sales people have seen it or have showed it, if they have put it out on a trip or if the photographer has it for an ad.
6. Look all around.
7. "If no one remembers seeing it or anything, they still can't find it, then they conduct a search of the department. (84)

According to Magner this was all done in this case and they didn't find the ring (84). The Government characterizes the above search as thorough. Based on the Government's evidence, there is no accountability by the store for the ring for a two month period, from May to July. In other words the store can't account whether the ring was in or out of the store for that entire two month period preceding the inventory and without any direct proof the ring was stolen, the jury was asked and could only infer from inadequate facts that the ring was stolen. This was error.

There was no proof that this so-called thorough search unveiled any evidence, or even clues, that the ring was stolen. If the ring had been stolen, and in view of the alleged thoroughness of the search, certainly some evidence would have been discovered.

On page 2 of its brief, the Government then characterized the manner in which the store safeguarded its precious jewelry by stating it exercised extreme coution, citing page 60 of the transcript which dealt with Magner testifying as to the store's procedure in handling precious jewelry when it is first received. This does not show or prove any safeguards by the jewelry has been received and is under the custody of the store. In fact this type of proof should mitigate against the Government. In exercising

caution in safeguarding the jewelry, how could the ring have been stolen and isn't it more likely that it was merely misplaced by the store itself? No matter how precise the store was in keeping good records of the jewelry, this is of little or no value if once the human involvement of the store enters the picture it is less than careful. Mr. Magner's testimony best exemplifies this when he testified that he didn't know whether he took the diamond with him or not after he had shown it in Mr. Ramsden's office (72). Also, isn't the human element missing completely in the safeguarding issue inasmuch as there was absolutely no accountability for the ring for a two month period from the time it was allegedly last shown to the date of inventory. But for the inventory the store may never have discovered the ring was missing.

The Government on page 3 of its brief emphasizes even further the special treatment given jewelry worth over $500. As aforesaid, this only mitigates more against the fact the ring was stolen. The reason for emphasis of these facts by the Government is not evident. They state that when the ring was not on display in a locked showcase, it was kept in a safe on the sales floor to which only five people had the combination or in a safe in the office area to which only three people had the combination. The Government did not and could not prove in which this ring was last placed, if it was ever placed therein because Magner couldn't even remember whether or not he took the ring with him after showing last to a potential customer. With this type of conduct, it cannot be fairly inferred the ring was ever stolen. With this argument of so-called strict security, the Government is really proving that the ring could not possibly be stolen. They go on to state on page 3 that a full-time security investigator was always present when the safes were open and that elaborate alarm systems were attached to the safes and three persons were required to be present before the safe on the sales floor was opened. Of course, there is no testimony that this ring was ever in the safe on the sales floor. Magner testified he believed it was in the upstairs safe (77). Also there is no testimony that the aforesaid alarms ever went off nor is there any other evidence that in spite of this so-called elaborate security, the ring was stolen. In effect what the Government has said is that they have proven that the last man at the store having shown this ring does not recall what he did with it after he showed it; that the store's requirements for written records of precious jewelry is superb as is the handling of precious jewelry generally; however there is absolutely no evidence of this ring after it was last in Mr. Magner's hands; that there is no evidence nor clues of the ring being stolen; and that in view of the extreme caution in safeguarding precious jewelry and the special treatment afforded such jewelry by the store makes it unlikely that the same could have been stolen.

Mr. Magner also testified that every morning the stones are taken out of the safes, they are polished and placed in the showcases (74). He did not testify what had been done with the stone in question, however. He only testified as to the store's general procedures. In view of this

testimony, it's difficult to understand that the stone in question was not missed by anyone during the two month period from when it was last shown to date of inventory. Magner indicated he participated in taking the stones out of the safes (74). How is it that he didn't miss the ring during this two month period? Magner had the combination to the safe on the sales floor (76). Magner testified to the elaborate alarm system on the safes (76), showing it was virtually fool-proof to steal from the safe.

In its Point I on page 8, the Government, in explaining the "substantial circumstances" from which the jury could infer the ring was stolen, characterizes the diamond as having disappeared "mysteriously." There is no proof of a mysterious disappearance. In fact, there is no evidence of a disappearance at all. There is a complete absence of any proof of the disappearance at all. There is is a complete absence of any proof of the ring at the store after May 25th until the inventory in July two months later.

The Government continues to emphasize in Point I the good security measures of the store which, as contended previously, would make a theft of the ring unlikely, especially in the absence of clues, etc.

The difference in price is not significant. The seller acquired the ring apparently as a result of gambling. It's likely, therefore, the seller, who is deceased, did not know the true value of the ring. A price of $20,000. for a ring wholesaling for $39,000. is not insubstantial, especially if the same was acquired by the seller as aforesaid and also inasmuch as the seller and purchaser were friends and business acquaintances.

While it's true that the price paid of $20,000. was substantial when compared to defendant's income at that time, in view of defendant's matrimonial proceeding at that time and in view of the fact that this ring was for his present wife, whose money may also have been used for the purchase, the differential and the price paid are reasonably accounted for.

While it's true that the defendant did not get an appraisal before he purchased, this too is reasonably explained by the fact he was buying from a friend and business acquaintance of long standing, his cash outlay was only $15,000. and from all the proof the ring must have been quite appealing even to the untrained eye.

As aforesaid, there is no proof title papers were required. The old adage that a lawyer who represents himself has a fool for a client may apply although how many people whould think of title papers in an informal and personal transaction of this type?

The Government in Point I on page 8 states the defendant waited twenty months before trying to sell the ring. There is no proof he waited for anything, let alone selling the ring. True he went to sell the ring twenty months later but that's a big difference from waiting twenty months to sell. Also the fact that twenty months elapsed, that defendant and his wife dealt openly with the ring, that they didn't use assumed names etc.

All of these facts support a course of conduct consistent with innocence. Magner also testified as to what the store procedures were generally regarding taking rings outside the store (78-80) but there is no evidence that the ring in question was ever taken out of the store after it was allegedly lost shown in May, therefore, again, this testimony is not relevant and inasmuch as there is no evidence this ring was taken out of the store in the regular course of business, the only purpose of this testimony referring to strict regulations by the store would be to improperly influence the jury. In fact, this type of testimony as aforesaid, is only supportive of the defendants position that there is no proof the ring was stolen and the testimony should not have been allowed and the jury should have been so instructed and failure to do so was substantial error.

On page 3 of its brief, the Government states that as a final precaution the store takes an inventory of its precious jewelry twice a year. In spite of all the precautions and the safeguards, the ring was not discovered missing until inventory time, and therefore, it cannot be properly inferred from such testimony that the ring was stolen, and the court erred in failing to find as a matter of law that the Government failed to prove the ring was stolen.

Thereafter on page 3 of its brief, the Government details the facts how this ring was discovered again. The defendant and his wife, with another couple, went to a dealer in precious stones in the heart of New York City at Rockefeller Center. Defendant is a practicing attorney (244). It is therefore fair to assume he had a better knowledge of the law than the average lay person. Nevertheless, defendant took his wife and another couple along (122). If defendant would have had any knowledge of anything wrong, in view of his knowledge as a lawyer, he certainly would not have taken his wife and another couple along. He would have gone by himself. With such knowledge being a lawyer, he would not have gone to a place in as fine an area as Rockefeller Center but instead to a fence or a less prestigious place.

In view of his knowledge as a lawyer and the inherent risk with hot merchandise, would Frank Clark have accepted the jeweler's suggestion of taking the stone out of the mounting, leaving it behind, and sending it to the Gemological Institute of America (123). Duffield testified that his associate recommended this procedure "if the Clarks were willing" (123). The defendant under all the circumstances attendant in this case, would never have agreed to leaving this ring behind if he had any reason at all to believe it was hot or stolen. There is not one iota of direct proof that the ring was stolen or that the defendant knew it was stolen and the jury was allowed and instructed as to inferences which could only be drawn on these two points from facts so inadequate as bases for such inferences that to allow the same is clearly a miscarriage of justice. If there ever was a case of a conviction where the evidence adduced to convict required scrutinization by an appellate court, this is it. To permit this conviction

to stand on the evidence in this case, from which inferences were allowed, is a severe travesty of justice.

Duffield testified further that he signed a receipt for $75,000 for the ring and gave it to the defendant (123), and the defendant filled in his name and address on a memorandum (124). He had no objection to a copy of this form going into evidence (124). Now again is this the type of conduct that could reasonably be expected by an attorney if the ring was stolen and he knew it was stolen? Obviously not because he is expanding his exposure to such a degree and perfecting the evidence against himself to such an extent that no reasonable person could fairly deduce from such evidence that the ring was stolen or that he knew it was stolen.

A small point but to show the tenor of this case, on page 4 of the Government's brief, after stating that the ring was taken over to a Mr. Doppelt, who immediately recognized the stone, the Government states that the FBI was contacted when in fact Duffield testified that after he locked the stone in the safe, he "received a call from the FBI" (126).

Concededly no documents of title were obtained from the ring. Unfortunately the informality under which the defendant acquired the ring from a friend and business associate accounts for the omission and the problem. However an indictment and conviction for such an omission is not only far too extreme but in no way criminal and the conviction cannot therefore be sustained. The Government never proved that documents of title were required under federal law or the law of any states concerned. Admittedly this case would very likely never occurred had there been documentation of title but the absence thereof doesn't make the matter criminal.

The Government sought to make much out of alleged inconsistent statements by defendant stemming from his matrimonial encounter. Human experience as well as legal experience indicate that those involved in matrimonial proceedings will be as conservative as legally possible to underplay their assets or net worth. One must read such answers to questions given during the period of matrimonial difficulties keeping these experiences in mind, whether given directly in a matrimonial proceeding or in some unrelated proceeding. Where the money comes from, or whose money was used to purchase the ring has little or no relevance in determining whether the ring was in fact stolen and whether defendant knew it was stolen. On page 7 of its brief the Government states the defendant told a newspaper reporter that collecting rings was a hobby of his and that he got one that wasn't apparently right. On page 190 of

the transcript, the witness testified that the defendant told him this "kind of in a joking way".

On page 7 and 8 of its brief, the Government recites the appraisals and inquiries regarding insuring of the ring by the defendants. Such evidence is clearly inconsistent with the Government's theory that this ring was stolen and defendant knew it was stolen, on both of which points there is no direct evidence.

On page 8 the Government recites the reasons for selling the ring, all of which are plausible and reasonable and do not spell out a purpose of selling due to fear or concern because the ring was stolen. There was no evidence the defendant nor his wife handled this ring in a clandestine manner or in any other manner consistent with the ring being stolen.

All of defendant's conduct throughout his twenty month possession of the ring is consistent with innocence. The Government on page 9 of its brief sets forth the facts on which it relies the jury could infer that defendant knew the ring was stolen. They refer again to the inconsistent statements attributed to defendant as to how and when he obtained the diamond. As aforesaid, this occurred during the courseof defendant's matrimonial case and the purposes and motives there were substantially different. Inconsistent statements in any event would afford a weak basis from which to infer any fact, if a fact could be inferred therefrom at all. This is not the type of quality of factual basis the court's allow a jury to infer a fact in a criminal case.

The affidavit in support of the search warrant, on page 12 of Government's brief, states the ring was found missing in the store's January 1973 inventory. This is not correct. The ring was fully accounted for in the January 1973 inventory and the same was not found missing until six month's later during the July 1973 inventory. Inconsistencies thus have occurred also in the Government's case.

Therefore, the evidence is insubstantial and insufficient and the court erred in allowing the jury to infer therefrom that the ring was stolen and that the defendant knew it was stolen.

II

THE COURT BELOW ERRED IN FAILING TO DISMISS THE INDICTMENT AND ALLOWING CERTAIN INSTRUCTIONS AND PERMITTING CERTAIN REMARKS BY THE GOVERNMENT DURING THE TRIAL

At pages 15 and 16 of its brief, the Government confuses the request by the jury for further instruction on the matter of guilty knowledge by

including in said request an instruction on the stipulation regarding possession and transportation of the ring. The error and harm is that the jury could equate or infer the matter of the stipulation with guilty knowledge, which is the basic element of the alleged crime to be proven beyond a reasonable doubt.

At point V of its brief, the Government states that "for the most part" the remarks of the prosecutor were proper. It was the improper part which tainted the entire proceeding and prevented a fair trial.

The Government's failure to label the diamond in the indictment as a "stolen diamond" (p. 16 of Government's brief) is readily understandable since the store and all others who concededly were in proper possession of the ring, never referred to the diamond as anything more than a missing diamond. The cases cited by the Government hold a contrary view which is that the indictment should label the property in issue as stolen.

The Jacob's case cited at page 9 of the Government's brief held that the jury must be told that defendant either actually knew the bills were stolen or that defendants manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe to be a fact. To the contrary, Clark, defendant in this case was publicly showing the diamond and calling attention to the diamond as properly owned property. Jacob's case is therefore no authority for the Government against the defendant in this case.

The Government's position that Miranda warnings mut be given only in a coercive situation (p. 11 of Government's brief) is not accurate. To the contrary, when the Government obtains information which is used to prosecute the person giving the information, warnings must be given to at least alert such person that he is in jeopardy.

In the Government of The Virgin Islands v. Torres, 161 F. Supp. 699, the District Court of the Virgin Islands declared as unconstitutional a provision of the Virgin Islands Code which permitted the court to correct a defendant upon proof of mere possession or transportation of an article which is only suspected by the court to have been stolen or unlawfully obtained under the due process clause of the Fifth Amendment of the Constitution. In the matter at hand there was no evidence submitted to prove that the ring in question was stolen but only that it was suspected of being stolen by inference.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, in the interest of justice, a new trial should be ordered.

Respectfully submitted.

Howard F. Cerny
Attorney for Defendant-Appellant
345 Park Avenue
New York, New York 10022

(212) 688-0700

AFFIDAVIT OF SERVICE

Re: 75-1178
United States of America v. Clark, III

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Defendant-Appellant .

That on the 11th day of August , 1975, I served the within Reply Brief for Defendant-Appellant in the matter of United States of America v. Frank Clark, III ,

upon Paul J. Curran, Esq., United States Attorney,
1 St. Andrews Place, New York, New York

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 11th day
of August 1975.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.